

a

KEHAR SINGH JASA SINGH

v.

THE STANDARD CHARTERED BANK

SUPREME COURT, KUALA LUMPUR

SALLEH ABAS LP

b

SYED AGIL BARAKBAH SCJ

WAN HAMZAH SCJ

[CIVIL APPEAL NO. 428 OF 1985]

15 MAY 1986

c

TORT: Money missing during banking transaction - Negligence - Liability - Issues - Whether possession of the money had already passed to the cashier and therefore to the respondent bank - If so whether the cashier and therefore the bank negligent.

d

This appeal originated from the Magistrate's Court. The appellant sued the respondent bank for the recovery of RM8,989.25. The bank denied liability. The learned Magistrate gave judgment in favour of the appellant on the ground that the bank was negligent. On appeal to High Court, Harun J reversed the decision holding that the respondent bank was not liable but he gave no reason for this opinion. On leave being granted the matter came before the Supreme Court.

e

On 8 September 1982 the appellant and his wife went to the respondent bank at Kelang to buy a Sterling bank draft for £2,200 which is equivalent to RM8,989.25. The appellant went to the cashier's counter and deposited the application form which was earlier signed by the clerk at the Foreign Exchange Counter together with the RM8,989.25 in the cashier's trough. The trough was partially open and the cashier was engaged in counting money of the previous customer whom she had already dealt with. While the appellant and his wife were waiting to be served, a stranger came to them and directed their attention to a RM10 note lying on the floor. After the couple had bent down to pick up the RM10 note they noticed that the money which had been placed earlier in the trough had gone and that the stranger

f

had disappeared.

There were two issues raised in this appeal. First whether possession of the money had already passed to the cashier and therefore to the respondent bank. Secondly, if so whether the cashier and therefore the bank was negligent.

*g***Held:**

[1] Both the appellant and the respondent bank were guilty of negligence. The appellant's negligence consisted of putting the money in the trough when the cashier was not ready to attend to him whilst the bank's negligence was the failure of the cashier to attend to the appellant's need when the trough was at that time partially opened on the appellant's side.

h

[2] The loss should equally be apportioned. The appellant could recover half of the amount claimed.

[Appeal allowed. Costs to appellant both here and in the Court below.]

For the appellant - C.V. Das (Charanjit Singh Saini with him); M/s. Farid Ariffin & Associates
For the respondent - Robert Lazar; M/s. Shearn Delamore & Co.

i

JUDGMENT

Salleh Abas LP:

This is another appeal which originated from Magistrate's Court.

On 8 September 1982 the appellant and his wife went to the respondent bank at Kelang to buy a Sterling bank draft for £2,200 to be sent to their son in England. They went first to the foreign exchange counter, filled in an application form and handed it to the clerk in charge who subsequently filled in the equivalent amount in Malaysian Ringgit, which was RM8,989.25. The clerk signed the form and handed it back to the appellant with instruction to give the form and pay the money to the cashier. He then went to the cashier's counter and deposited the form together with the money in the cashier's trough.

The cashier's counter is not an open counter but a closed one in which there is a transparent screen separating the cashier from the customer. Below the screen is the trough which has a lid, which can only be closed partially; either on customer's side or on the cashier's side for the purpose of handing and receiving money. According to the practice of the respondent bank the trough would be opened on the customer's side when the cashier is ready to receive the money and this side would be closed when the cashier is not ready to take it.

At the time when the appellant and his wife went to the cashier's counter, the customer's side of the trough was partially open and the cashier was engaged in counting money of the previous customer whom she had already dealt with. The appellant's wife placed the form and the money RM8,989.25 in the trough and while both were waiting to be served, a stranger came to them and directed their attention to a RM10 note lying on the floor. After the couple had bent down to pick up the RM10 note they noticed that the money which had been placed earlier in the trough had gone and the stranger disappeared.

When sued for the recovery of RM8,989.25 the respondent bank denied liability. The learned Magistrate gave judgment in favour of the appellant on the ground that the bank was negligent, but on appeal to the High Court, Harun J reversed the decision holding that the respondent bank was not liable but he gave no reason for this opinion. On leave being granted the matter came before us.

There were two issues raised in this appeal. First, whether possession of the money had already passed to the cashier and therefore to the respondent bank. Secondly, if so whether the cashier and therefore the bank was negligent.

After listening to the submissions of both Counsel, we came to two different opinions. The majority opinion (Syed Agil and Wan Hamzah SCJ) is that both the appellant and the respondent bank were guilty of negligence. The appellant's negligence consisted of putting the money in the trough when the cashier was not ready to attend to them whilst the bank's negligence was the failure of the cashier to attend to the appellant's need when the trough was at that time opened on the appellant's side, though partially. In their judgment the loss should equally be apportioned and the appeal should therefore be allowed.

With respect, I wish to differ from their opinion. In my view the case should be decided on the question whether or not possession of the money had already passed from the appellant to the cashier. If the trough was closed on the customer's side so that the appellant had to push the lid in order to put in the money there can be no doubt that possession thereof could not have passed from the appellant to the respondent bank. But, as has been disclosed in this case, the appellant put in the money when the trough was partially open on his side,

- a* i.e. customer's side. Since the trough, according to the practice of the bank must be closed if the cashier is not ready to receive the money by leaving it open, though partially, the respondent bank must be regarded as telling the customers that they are ready to receive the money and inviting them to place the same in it, and therefore the appellant is entitled to do so. That being the case possession of the money must in my view pass to the respondent bank the moment the money was placed in the trough. Now, since it was stolen
- b* whilst it was in their possession they must be responsible, as they owe a duty of care towards their customers. It makes no difference whether the cashier who was busy counting other money was aware or unaware of the fact that the appellant had placed the money in it, because what constitutes the respondent bank's negligence is the fact they allowed the customer's side of the trough to remain open, though partially and to let the money to remain in it without being attended to. No explanation at all was forthcoming from them why it was
- c* left partially opened. The finding of the learned Magistrate on this fact is clear and uncontroverted.

If the possession of money had not passed to the respondent bank I could not see how duty of care on their part could arise. In such situation the loss should be borne by the customer, as he should be responsible for the safety of his money. But that is not what happened in the present case.

- d* I therefore would allow the appeal of the appellant in toto as I cannot see how he be held to be negligent at all.

However since the majority view prevails, the appeal was allowed to the extent that the appellant could recover half of the amount claimed. He is also entitled to the costs both here and in the Court below and the deposit should be refunded to him.

e

Also found at [1987] 1 CLJ 239

f

g

h

i